Equality and The Schools: Education as a Fundamental Interest

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.¹

Education, then, beyond all other devices of human origin, is the great equalizer of the conditions of men—the balance-wheel of the social machinery.²

INTRODUCTION

One striking feature of modern American society is the depth of its commitment to education. In 1970 nearly 60 million Americans were enrolled in elementary and secondary schools, colleges and universities, and almost one million were attending day care and pre-school programs.³ Approximately 30 per cent of the population was enrolled in some form of schooling, and over 6,000,000 people were employed in the educational sector to service these students.⁴ Clearly, America has invested heavily in education and, not surprisingly, education has had "a profound effect on our society."⁵

With respect to the individual, it has been noted that the formal education which a young citizen receives is probably the most important determinant for his future.⁶ To a very significant degree, educational institutions "select persons to fulfill the hierarchy of social, political and economic roles of society."⁷ The individual who receives a "better"

¹. U.S. CONST. amend. XIV, § 1.
³. STAFF OF THE SENATE SELECT COMM. ON EQUAL EDUCATIONAL OPPORTUNITY, 92D CONG., 2D SESS., THE COSTS TO THE NATION OF INADEQUATE EDUCATION I (Comm. Print 1972) [hereinafter cited as EDUCATION]. This report, prepared by Professor Henry M. Levin of Stanford University, gives an excellent analysis of the costs of inadequate education to our society in both economic and social terms. Although beyond the scope of the present comment, the findings obtained by Professor Levin's research are very significant. The report provides the basis for much of the material in this introduction and in the section discussing the effects of unequal education.
⁴. EDUCATION, supra note 3, at 1.
⁵. Id. This theme is exhaustively developed in Hearings On Equal Educational Opportunity Before the Senate Select Comm. on Equal Educational Opportunity, 91st Cong., 2d Sess. (1970).
⁶. EDUCATION, supra note 3, at 1.
⁷. Id. Conversely, being left out of this selection process can lead to "unequal job opportunities, disparate income, and handicapped ability to participate in the social,
education is in a better position to obtain the more preferable occupation and, consequently, higher earnings.

One basic assumption of the American educational system has been that, as an institution, it is a positive means for providing equal opportunities for persons drawn from heterogeneous backgrounds. Under this view, free public schooling should assure that the individual competes on an equal basis, regardless of the social class into which he or she is born. Of course this theory is premised on the idea that the system of public education will create equal opportunity by providing equal educational opportunity.

Yet, there are few people, if any, who would seriously maintain that either equal opportunity or equal educational opportunity is a reality in our society. Indeed, recent studies have shown that "the present system of financing and operation of the educational system leads to greater investments of resources in the rich child than in the poor one." Non-white children still generally receive an education that is inferior to that of white children. Further, the schools are "far more effective in providing mobility and status for the middle class child than the lower class one." As a result, the educational attainment and occupational success of children are still positively correlated with those of their parents. In short, the promise of equal opportunity through equal education has not been kept.

This comment will focus on the legal implications of the denial of equal educational opportunities. Specifically, the issue to be examined

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10. Id. For an analysis of the financing procedures that lead to this result and a proposed constitutional remedy, see Coons, Clune, & Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 Calif. L. Rev. 305 (1969).
13. The relationship between social class and educational achievement is documented in the Coleman Report. See note 11 supra.
is whether education is a fundamental interest within the meaning of the equal protection clause of the fourteenth amendment so as to justify special judicial consideration whenever there is an alleged denial of equal educational opportunities.

**EQUAL PROTECTION OF THE LAW**

In recent years the United States Supreme Court has employed two distinct approaches to claims asserted under the equal protection clause of the fourteenth amendment. 14 These approaches involve substantially different degrees of deference for state legislation depending upon its subject matter and character. 15 Before considering either approach, however, it should be noted that most state laws are based on classifications of persons or property and necessarily involve some disparity in treatment accorded the various classes created. Yet, "it is clear that not every legislative classification occasioning differential treatment is a violation of equal protection. . . ." 16 The only constitutional requirement is that the differential treatment be based on some reasonable classification. 17 The issue is thus narrowed to what standards of review shall be utilized by the courts in determining the reasonableness of a statutory classification.

(a) **Traditional Equal Protection**—When determining the constitutional validity of state economic and business regulations, the Supreme Court has traditionally exercised restraint. The long established rule is one of the "investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." 18 The rationale behind this rule of judicial deference seems to be that the legislature is better suited to handle the complex issues involved in economic regulation. Additionally, the Court is conscious of

its own remoteness and lack of familiarity with local problems, whereas legislators are more apt to be in close touch with their local communities. This differential attitude is so strongly felt that only once in recent years has a significant regulatory measure been found to violate equal protection.\textsuperscript{19}

(b) \textit{New Equal Protection—The Strict Scrutiny Doctrine}—Where, however, human rights or individual liberties are involved, the concept of judicial self-restraint has given way to a more exacting standard of review. When a legislative classification touches a "fundamental interest" or employs a "suspect classifying trait" the Court has adopted an attitude of active and critical analysis, subjecting the classification to "strict scrutiny."\textsuperscript{20} When "strict scrutiny" is thus invoked, the state bears the burden of establishing that it has a "compelling interest" which justifies the law and that the distinctions drawn by the law are necessary to its purpose.\textsuperscript{21} This "compelling interest" approach clearly tips the scale in favor of the individual as opposed to the state, and thus "constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective."\textsuperscript{22}

The branch of the strict scrutiny doctrine which requires that classifications based on "suspect criteria" be supported by a compelling interest appeared first in cases involving race classifications.\textsuperscript{23} Today the list appears to include classifications based on alienage and nationality,\textsuperscript{24} wealth,\textsuperscript{25} status,\textsuperscript{26} political allegiance\textsuperscript{27} and residence.\textsuperscript{28} It is difficult to

\textsuperscript{19} Morey v. Doud, 354 U.S. 457 (1957). An Illinois statute required firms issuing money orders in the state to secure a license and submit to certain regulations. The statute specifically exempted the American Express Co. from the requirements. The Supreme Court held that the statutory classification was so unreasonable as to constitute an invidious discrimination contrary to the equal protection clause.

\textsuperscript{20} \textit{See Developments, supra note 18. at 1087-1088, 1120-1121. See generally Michelman, Forward: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969).}


\textsuperscript{22} Shapiro \textit{v.} Thompson, 394 U.S. 619, 658 (1969) (Harlan, J., dissenting). It is significant to note that the Supreme Court has never upheld a state interest as "compelling" where the "strict scrutiny" standard was invoked. \textit{See Dunn} \textit{v. Blumstein}, 405 U S. 330, 363-364 (1972) (Burger, C.J., dissenting).


isolate a common denominator in these "suspect traits." However, it has been suggested that the special need to protect discrete and insular minorities is an appropriate reason for arguing the existence of suspect traits in order to invoke the "heightened judicial solicitude" of the strict scrutiny doctrine. Additionally, it would seem that the doctrine should apply whenever the classification "discriminates against an individual on the basis of factors over which he has no control." 

The "fundamental interest" branch of the strict scrutiny doctrine has identified voting, procreation, rights with respect to criminal procedure, interstate travel, and possible first amendment rights as

29. In United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938), Justice Stone said:
   There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
   Nor need we inquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

This rationale was used to label alienage a suspect classification in Graham v. Richardson, 403 U.S. 365 (1971).

The "preferred position" accorded freedom of expression appears somewhat analogous to the fundamental interest concept. Thus, first amendment interests "would likely call forth this same strict scrutiny in the equal protection contexts, but courts commonly
deserving of special treatment under the equal protection clause.\textsuperscript{36} However, a comprehensive theory for distinguishing fundamental interests from other interests has not been formulated by the Court. Indeed, the elusive quality of this concept led Justice Harlan to conclude that the Court has simply picked out particular human activities and given them added constitutional protection.\textsuperscript{37} Yet if the different treatment accorded these personal interests does rest upon a belief that they are simply more important than others, there is nevertheless an arguable logic to such a belief. An exploration of this logic will perhaps develop the parameters of the fundamental interest concept.

**Fundamental Interests and the Courts**

It appears that one common thread running through the fundamental interest cases is the severity of the detriment imposed on the individual when the interest is restricted.\textsuperscript{38} Another common factor seems to be the importance of the interest in the over-all context of a system based on democratic values. These two elements, when combined, seem analogous to the "fundamental fairness" or "ordered liberty" concept that Justice Cardozo identified as the touchstone of due process of law.\textsuperscript{39} Thus, it has been suggested that Justice Frankfurter's description of the uncertainty of the task of applying due process is also applicable to the determination of what is a fundamental interest under equal protection:\textsuperscript{40}

It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably invoking the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.\textsuperscript{41}

 Appropriately enough in a representative democracy, the Supreme

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\textsuperscript{36} Developments, supra note 18, at 1127.

\textsuperscript{37} Shapiro v. Thompson, 394 U.S. at 662. One observer has complained about the lack of "a rational standard" by which fundamental interests may be identified. Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91, 95 (1968).

\textsuperscript{38} Developments, supra note 18, at 1130.

\textsuperscript{39} Palko v. Connecticut, 302 U.S. 319, 324-25 (1937). For a criticism of the notion that personal rights are more important than economic interests, see L. Hand, *The Bill of Rights* 50-51 (Atheneum ed. 1964).

\textsuperscript{40} Developments, supra note 18, at 1130-1131.

\textsuperscript{41} Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162 (1951).
Court long ago characterized "the political franchise of voting" as a "fundamental political right, because preservative of all rights."\textsuperscript{42} This right, which the Court has labeled "precious,"\textsuperscript{44} is "close to the core of our constitutional system."\textsuperscript{44} Thus, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."\textsuperscript{45} Surely an individual suffers a severe detriment when a right which is preservative of his other basic civil and political rights is infringed. Additionally, since the right to vote "is a fundamental matter in a free and democratic society,"\textsuperscript{46} it would be a serious affront to democratic values to allow that right to be infringed.

The right of procreation has been described as a "sensitive and important area of human rights" which is "fundamental to the very existence and survival of the human race."\textsuperscript{47} Thus, where a state statute required sterilization for certain classes of criminals the Court held that those affected were denied "one of the basic civil rights of man."\textsuperscript{48} The severity of the detriment was obvious in that "[t]here is no redemption for the individual whom the law touches."\textsuperscript{49} In terms of democratic values, the Court was concerned that the right to procreate should remain protected so that "groups which are inimical to the dominant race will not wither and disappear."\textsuperscript{50}

\textsuperscript{42} Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (dictum). The case involved an ordinance which made it unlawful to operate a laundry in wooden buildings (as distinguished from brick or stone) without the consent of a board of supervisors. Although the classification appeared reasonable, the licensing authority consistently refused licenses to Chinese applicants while granting licenses to non-Chinese applicants. This application of the ordinance, "with an evil eye and an unequal hand," was held violative of the equal protection clause.

\textsuperscript{43} 383 U.S. at 670.

\textsuperscript{44} Carrington v. Rash, 380 U.S. 89, 96 (1968). A Texas statute requiring residence as a qualification to vote in state elections but prohibiting servicemen stationed in Texas from ever acquiring residence was held to be a violation of the equal protection clause.

\textsuperscript{45} Reynolds v. Sims, 377 U.S. 533, 561-562 (1964) (reapportionment of state legislature must reflect popular representation as nearly as possible).

\textsuperscript{46} Id. at 561-562.


\textsuperscript{48} 316 U.S. at 541. Closely associated with the right of procreation is the right of privacy of which Justice Douglas spoke in Griswold v. Connecticut, 381 U.S. 479 (1965).

\textsuperscript{49} Stanley v. Georgia, 394 U.S. 557 (1971), where the Court stated: [A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

\textit{Id.} at 564.

\textsuperscript{50} 316 U.S. at 541.

\textit{Id.}
Equal rights with respect to the criminal justice process have been called "the central aim of our entire judicial system." The concern of the Court has been that all people charged with crime must "stand on an equality before the bar of justice in every American court." This notion of equality is so strongly felt by the Court that it has, in effect, required compensatory state action to assist indigents in the appellate process. The severe detriment which could accompany a denial of this right is apparent: a person could lose his life, liberty or property because of an unjust conviction which an appellate court would set aside. And certainly the methods employed in the enforcement of criminal law relate to basic democratic values. Indeed, the Court has referred to these methods as "the measures by which the quality of our civilization may be judged."

The right to travel has been referred to by the Court as "a part of our heritage which may be as close to the heart of the individual as the choice of what he eats, or wears, or reads." Thus, this right "occupies a position fundamental to the concept of our Federal Union." Justice Griffin v. Illinois, 351 U.S. 12, 17 (1956) (due process and equal protection clauses of the fourteenth amendment were violated by the state's denial of appellate review solely on account of a defendant's inability to pay for a transcript).


Sec, e.g., Douglas v. California, 372 U.S. 353 (1963), in which the Court said that the equal protection clause is violated by a state appellate court's denial of an indigent defendant's request for the appointment of counsel on appeal, under a state rule of criminal procedure authorizing such denial where, upon an independent investigation of the record, the appellate court determines that the appointment of counsel would be of no value to either the defendant or the court.


Kent v. Dulles, 357 U.S. 116, 125-126 (1958) (in the absence of Congressional authorization, the Secretary of State has no power to deny a passport to a citizen merely because of his refusal to disclose his political beliefs or associations).

United States v. Guest, 383 U.S. 745, 757-758 (1966). It is interesting to note the various approaches used by the Court in locating a constitutional base for the right to travel. Justice Douglas has said that "the right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment" Kent v. Dulles, 357 U.S. 116, 125 (1958). In Edwards v. California, 314 U.S. 160 (1941), the Court based its affirmation of the federal right of interstate travel upon the commerce clause. In Oregon v. Mitchell (also cited as United States v. Arizona), 400 U.S. 112, 285 (1970). Justice Stewart suggested that the right to travel is a privilege of national citizenship and therefore protected by the fourteenth amendment. Finally, Justice Brennan, while recognizing its existence, has declined "to ascribe the source of this right to travel interstate to a particular constitutional provision." 394 U.S. at 630.
Douglas has compared the right to travel to first amendment rights in that "it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking." Thus, an individual's freedom of movement "is basic in our scheme of values," and to deny this right would certainly have a detrimental effect on individual personal development. Further, in the context of a system based on democratic values, "[t]his freedom of movement is the very essence of our free society, setting us apart."

As noted earlier, the Supreme Court has not put forward a formula which lists all the essential ingredients of a fundamental interest. The above analysis purports only to identify two possible elements which contribute to the rationale behind the fundamental interest concept. Yet, these two elements—the severity of the detriment to the individual and the importance of the interest in the over-all context of a system based on democratic values—appear to be present with sufficient regularity in the fundamental interest cases so that their presence with respect to another interest may offer a basis for arguing that such an interest is, indeed, fundamental. It is within this context, then, that education as a fundamental interest will be considered.

It should be noted that the mere fact that the Court has never explicitly declared education to be a fundamental interest capable of invoking strict scrutiny on its own (i.e., without any suspect classification to help tip the scales) does not, by any manner, defeat the validity of the proposition. What has been offered as perhaps the primary explanation for the Court's restraint—a notion of lack of judicial expertise to deal with the complex problems that plague educational institutions—no longer seems a tenable position in light of the decision in Swann v. Charlotte-Mecklenberg Board of Education to confront the difficult and politically explosive busing issue. The increasing importance of education is undeniable and, in fact, the Court appears to be just a short step away from holding it to be a fundamental interest. Such a

59. 357 U.S. at 126.
60. 378 U.S. at 520.
61. 402 U.S. 1 (1971). Speaking for a unanimous Court, Chief Justice Burger said that where school authorities fail in their obligation to cease maintaining a racially segregated, dual school system, the federal courts have broad power to fashion a remedy which will assure a unitary school system, including reassigning teachers, the use of racial ratios, altering of attendance zones, and requiring additional busing of elementary and secondary school students.
62. For a criticism of this anticipated step, see Kurkland, Equal Educational Oppor-
decision would be in keeping with the Court’s evolving notion of equality." As Justice Douglas has observed "The Equal Protection Clause is not shackled to the political theory of a particular era . . . notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." 

**Education and the Courts**

The increased recognition of the importance of education to the individual and society has been matched in recent years by an increase in litigation with respect to alleged denials of equal education. The Supreme Court at first proceeded cautiously, perhaps restrained by the notion that educational matters were reserved to the states and thus a proper concern only of the state legislature. Today, however, the Court may truly be called the great equalizer of educational opportunities. Indeed, the Court appears to have granted a de facto recognition to education as a fundamental interest. An examination of the major education cases may explain this development and offer a rationale for according education the status of a de jure fundamental interest.

(a) **Background**—Early cases concerned with equal educational opportunity usually involved some form of race discrimination. For example, in *Roberts v. City of Boston,* decided in 1849, the Supreme Judicial Court of Massachusetts considered the issue of separate public schools based on race in a suit brought by a five year old "colored" child who had been denied admission to a white school solely on the ground of her race. Although the court conceded that "colored persons, the descendants of Africans are entitled by law . . . to equal rights, constitutional and political, civil and social," it held that "the good of both classes of schools will be best promoted, by maintaining the separate schools for colored and for white children."

In 1896 the "separate but equal" doctrine was adopted by the United States Supreme Court as properly defining the scope and meaning of the fourteenth amendment's equal protection requirement with respect...
to black citizens. Although the case involved the validity of racial segregation in railroad cars, it was assumed that "separate but equal" was the proper test in considering claims of educational discrimination based on race or color. Thus, a system of apartheid "was afforded constitutional sanction on a national scale." In 1938 the Supreme Court began to lay the basis for the ultimate rejection of the "separate but equal" doctrine. In Missouri ex rel. Gaines v. Canada the Court held that to deny a black citizen admission to the State University's law school was a violation of the equal protection clause, even though state law provided that the state underwrite the educational expenses involved should the black student attend an out-of-state law school. The basic issue was not the duty of the state to supply legal training, or the quality of the training which it supplied, but rather "its duty when it provided such training to furnish it to the residents of the State upon the basis of an equality of right." Thus, any educational opportunities afforded had to be available to all on an equal footing.

McLaurin v. Oklahoma State Regents, decided in 1950, further illustrated the Court's commitment to the elimination of constitutional support for unequal education. McLaurin, after having been admitted to graduate study at the University of Oklahoma, was given different treatment from other students because of his race. He was required to occupy a seat in a row in the classroom specified for "colored students," a designated table in the library, and a special table in the cafeteria. A unanimous Supreme Court held this treatment to be a violation of the equal protection clause in that it interfered with McLaurin's ability to study, to engage in discussion and exchange of views with fellow students, and "in general, to learn his profession."

70. Id. But see Buchanan v. Warley, 245 U.S. 60, 81 (1917), where the Court explicitly repudiated Plessy's application to housing.
72. 305 U.S. 337 (1938). It has been argued that Gaines made inevitable the decision in Brown v. Board of Education to outlaw racial segregation in the nation's public schools. The legal strategy in Gaines was to urge adoption of a very rigid "separate but equal" standard "in the hope that the maintenance of segregated educational facilities might be rendered so burdensome and expensive as to cause the voluntary abandonment of the practice." Carter, supra note 69, at 5.
73. 305 U.S. at 349.
75. Id. at 641.
Recent Developments—In Brown v. Board of Education the Supreme Court “took the final step of formally overruling Plessy v. Ferguson.” The Court held that “in the field of public education, separate but equal has no place,” and that racial segregation constituted a denial of equal educational opportunity within the meaning of the equal protection clause. Through this line of cases, then, it would appear that “the Court both established the importance of public education as a matter of constitutional law and the proposition that . . . differences in skin color cannot justify racially segregated public educational facilities.”

The Brown decision may be viewed as based primarily upon equality of education and not upon racial discrimination as such. In making the argument for education as an historically favored interest, it is necessary to separate education from race, the presence of which has a tendency to obscure all other issues. The cause of the inequality in Brown was race-connected, “but the object of judicial concern was the plaintiff’s interest in education.” McLaurin supports this interpretation of the Court’s real emphasis in the race-education area. There the plaintiff was attending a “white” university but because of the restrictions imposed he was “handicapped in his pursuit of effective graduate instruction.” Clearly it was the quality of the education received that most concerned the court when it said:

Our society grows increasingly complex and our need for trained leaders grows accordingly. . . . Those who will come under [McLaurin’s] guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

78. 347 U.S. at 495.
79. Kurkland, supra note 62, at 584.
80. Coons, Clune, & Sugarman, supra note 10, at 378.
81. Id.
82. 399 U.S. at 641 (emphasis added).
83. Id.
There thus appears to be a common thread present in *Gaines, McLaurin* and *Brown*: a pragmatic attempt to define in real life terms those practices which deny in fact the opportunity for an equal education and thus are constitutionally defective.

The fundamental importance of education has been recognized by the Supreme Court in many cases not involving race discrimination. In *Meyer v. Nebraska* the defendant was convicted under a state statute forbidding the teaching of German in public and private schools to children below the ninth grade. The Court held the conviction a violation of due process under a theory that seemed to waver among "the teacher's right to teach, the parent's right to educate his child, and the child's right to learn." In consideration of these three educational interests the Court observed:

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. . . .

The *Meyer* approach seems to say that education is a public matter as well as private, and the state may not lightly make it in its own image.

The Court has often spoken of education in the context of first amendment cases. In *McCollum v. Board of Education*, a case involving released time for religious purposes, Justice Frankfurter termed the public school "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most persuasive means for promoting our common destiny." In *Abington School District v. Schempp*, the famous Bible

84. 262 U.S. 390 (1923).
86. 262 U.S. at 400.
88. People of State of Illinois *ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948) ("released time" program in which public school classrooms were used for religious instruction violated the first amendment principle of separation of church and state inasmuch as the program constituted a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith).
89. 333 U.S. at 231.
90. School Dist. of Abington Township, Pennsylvania *v. Schempp* (also cited as Murray *v. Curlett*), 374 U.S. 203 (1963). In one of the most bitterly controversial decisions ever handed down, the Court ruled that the first amendment's prohibition of any law respecting an establishment of religion, as applied to the states through the fourteenth amendment, was violated by a state statute, or a rule of a school board adopted pursuant to statutory authority, which required religious exercises to be performed in the schools. The religious exercises consisted of the reading, without com-
reading case, Justice Brennan said “Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government.” Thus it is to be expected that “constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom.” And in *Shelton v. Tucker* the Court declared: “[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.” Clearly, then, the Court has been keenly aware of the special qualities of the educational interest.

Perhaps the most classic expression of the importance of education was made by Chief Justice Warren in *Brown*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him to adjust normally to his environment. In these days, *it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.* Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Manifestly, the language of the opinion strongly indicates the fundamental importance of education to both the individual and to society.

The question of the constitutional role of education was squarely confronted in the recent case of *Serrano v. Priest*. There the California Supreme Court declared that “the distinctive and priceless function of

91. 374 U.S. at 230.
92. *Id*.
94. 347 U.S. at 493 (emphasis added).
95. 5 Cal.3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
In Serrano the court held that the state system of financing its public schools, dependent as it is on local property taxes, was a violation of the equal protection clause in that it makes spending per pupil a function of the school districts' wealth. In Van Dusartz v. Hatfeld a federal district court considered a similar attack on Minnesota's public school financing system. In holding the system to be a violation of the equal protection clause, the court noted that Serrano "has correctly inferred from relevant expressions of the United States Supreme Court and from the nature of education itself that this interest is truly fundamental in the constitutional sense." And in Rodriguez v. San Antonio Independent School District, where a similar fate was accorded Texas' public school financing scheme, the court observed, "more than mere rationality is required . . . to maintain a state classification which affects a 'fundamental interest' or which is based upon wealth. Here both factors are involved." The clear and unmistakable trend, then, is that education is, within the meaning of the equal protection clause, a fundamental interest.

The Effects of Unequal Education

The two elements found to exist in other interests deemed fundamental are certainly present with respect to education: a most severe detriment is suffered by the individual who is denied an equal education, and education is of paramount importance in the preservation and furtherance of basic democratic values. Certainly persons who receive an inferior education in a society which rewards individuals according to their educational achievement will suffer in comparison with those who have received better education. Moreover, "it is not only the individual who is adversely affected, but our society as well; for the direct effects of inadequate education for any person are visited indirectly on the nation." Thus, unequal educational opportunities have serious implications at once for the individual and for democratic so-

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96. Id. at 608-609, 487 P.2d at 1258, 96 Cal. Rptr. at 618.
98. Id. at 875.
100. Id. at 282. But see Parker v. Mandel, 41 U.S.L.W. 2133-34 (D. Md. June 16, 1972) (education, however vital, is not a constitutional fundamental interest).
101. See text accompanying notes 38-64 supra.
102. EDUCATION, supra note 3, at 45.
103. Id. For a summary of Professor Levin's findings on the costs to society of inadequate education, see text accompanying notes 104-112 infra.
ciety. An examination of this dual effect of unequal education in certain problem areas should lend further support to the notion that education is a fundamental interest.

The effects of inferior education on the individual and society are visible in many ways. For example, it is clear that if individuals are unemployed because of their low levels of educational attainment, then personal and social output is correspondingly reduced below what it would be if these individuals possessed training adequate for the existing job market. Thus, the individual suffers the normal consequences of low income and society is denied output which might otherwise have contributed to the social welfare.

It has been noted that the reduced earning power of those with inferior education imposes a very heavy burden on the public sector. "Low earnings or no earnings translate into little or no tax support for government supplied goods and services." Additionally, it is necessary to draw from public revenue to provide for food, shelter, medicine, and other services for those families whose incomes fall below a reasonable standard.

The relationship between inferior education and crime appears to be very significant. "The futility faced by persons with inadequate education in obtaining attractive, legitimate alternatives can lead to desperate attempts to achieve status, power, and money through illegal pursuits." To the extent that inferior education is a cause of crime, then a portion of the national resources allocated to the criminal justice system represent a social burden.

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104 Education, supra note 3, at 2. Professor Levin's study showed that the failure to attain a minimum of high school completion among the population of males 25-34 years of age in 1969 may cost the nation 237 billion dollars in income over the lifetime of these men.

105 Education, supra note 3, at 2.

106 Id. Under Professor Levin's standard, the cost of inadequate education in 1969 was 71 billion dollars in foregone government revenues, of which about 47 billion dollars would have been added to the Federal Treasury and 24 billion dollars to the coffers of state and local governments.

107 Education, supra note 3, at 2. Professor Levin has determined that welfare expenditures attributable to inadequate education are estimated to be about 3 billion dollars each year and are probably increasing over time.

108 Education, supra note 3, at 2. See also The President's Commission on Law Enforcement and Administration of Justice, Crime and Its Impact—An Assessment (1967).

109 Education, supra note 3, at 2. According to Professor Levin, the costs to the nation of crime that is related to inadequate education appears to be about 3 billion
Finally, it should be noted that inferior education has a significant impact on political participation. The theoretical underpinnings of our constitutional democracy demand active participation by all citizens in the political process. Yet, as one noted political scientist has stated, "the surest single prediction of political involvement is number of years of formal education." In other words, a poorly educated citizen is less likely to participate in the political process, and he therefore deprives himself of a voice in the workings of government. The effects of this non-participation have been cogently depicted:

1. Government decisions will be less likely to represent the views of "all of the people" particularly the less educated; this will tend to impart a bias to public policy that will favor the more educated and wealthy than would be the case if political participation were more representative.

2. This bias in participation creates a crisis of legitimacy of political processes among those who, because of their insufficient educations, do not participate. Government decisions are likely to be looked upon with suspicion as ones which are designed to work against the interests of the poorly educated.

3. As a consequence of their frustration, such citizens may turn to other forms of activity to express their dissatisfaction with existing government policies and public services. In recent years demonstrations, riots, and other disruptions have represented an alternative form of activity that has been used to express dissatisfaction with the results of the traditional political processes.

There is, then, ample evidence of the general phenomenon whereby educational shortcomings that harm the individual also harm the entire society. In a positive vein, it has been noted that "the pivotal position dollars a year and rising.

110. A. Campbell, The American Voter 21 (1962), quoted in Education, supra note 3, at 45. Professor Levin also found that the degree of political involvement of the population seems to be directly related to its educational level.

111. Education, supra note 3, at 45. Perhaps the words of James Madison bear repetition:

A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.


112. Education, supra note 3, at 45.
of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable."113 Today it may truly be said that "education is the lifeline of both the individual and society."114

EQUAL EDUCATION AS A RIGHT

As a fundamental interest education should invoke the "strict scrutiny" standard of the equal protection clause. While it has been noted that a successful use of the strict scrutiny approach may result by showing the presence of both a suspect classification and a fundamental interest,115 it is nevertheless clear that any classification of persons with respect to a fundamental interest can invoke strict scrutiny.116 As suggested by Hobson v. Hansen, "purely irrational inequalities even between two schools in a culturally homogenous, uniformly white suburb would raise a real constitutional question."117 The concept of education as a fundamental interest should thus lead to this conclusion: where the state has undertaken to provide educational opportunities, it has an affirmative duty to provide substantially equal educational opportunities to all its citizens. Any distinction in the quality of education provided should be subject to the most rigid constitutional scrutiny.

The notion that the state has an affirmative duty to provide equal educational opportunity finds support by analogy to Griffin v. Illinois. There the Supreme Court held that an indigent defendant cannot be denied the same opportunity for appeal from an adverse judgment that is available to others simply because he cannot afford the price of a transcript of the trial proceedings. Thus, in the area of criminal appeals, the equal protection clause imposed on the states an affirmative duty to lift the handicaps caused by differences in economic circumstances.118 If wealth is irrelevant to the administration of criminal justice, then perhaps it should also be irrelevant to the administration of social justice. As one group of authors recently observed:

Education not only affects directly a vastly greater number of

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113 Developments, supra note 18, at 1120-1121.
114. 5 Cal.3d at 605, 487 P.2d at 1255, 96 Cal. Rptr. at 616.
115. Developments, supra note 18, at 1120-1121.
118 351 U.S. at 37.
persons than the criminal law, but it affects them in ways which—to the state—have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong) education also supports each and every other value of a democratic society—participation, communication, and social mobility, to name but a few.119

Recent Supreme Court cases dealing with the franchise are based on a rationale that may be used to support the notion of an affirmative duty to provide equal educational opportunities. In the reapportionment cases120 the principle was established that accidents of geography and the arbitrary boundary lines of local government can afford no basis for discrimination among citizens of a state with respect to the impact of their ballots: the right to vote means more than simply pulling a lever; it signifies the right to an equal vote. Similarly, it may be said that “the right to an education today means more than access to classrooms.”121 It should mean the right to the same quality education afforded every other student within the state. Presumably the rationale behind the one man-one vote rule122 is that voting is a fundamental right which is preservative of other basic civil and political rights and thus it must be afforded to all on an equal basis.123 Yet, it has been observed, “education seems the equal of voting in sheer importance to a democratic society. It underlies the whole substance of the political process and is antecedent to voting in the orders of both time and cause.”124 Additionally, while it may be said that voting is a right, education is considered so significant that the state has bypassed the establishment of the right and rendered education a duty.125 In sum, then, it would only seem reasonable to afford the right to an equal education the same protection that has been afforded the right to vote.

121. 5 Cal.3d at 607, 487 P.2d at 1256, 96 Cal. Rptr. at 617. See Horowitz & Neitring, Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs from Place to Place Within a State, 15 U.C.L.A. L. Rev. 787, 811 (1968).
124. Coons, Clune, & Sugarman, supra note 10, at 368.
125. Id.
CONCLUSION

Under the approach that education is a fundamental interest, any means which tend to cause inequality among citizens with respect to educational opportunities are constitutionally impermissible unless justified by a compelling state interest. The "neighborhood school" (with its accompanying de facto segregation), the school district, the state financing method—all these could be the subject of strict judicial scrutiny. Wherever there is any significant difference among classes of people within the state with respect to the quality of public education offered, there exists a basis for remedial action.

There would, of course, be a need for guidelines to help courts determine the contours of equal education as a constitutional requirement. Indeed, perhaps the major problem lies in determining with some exactness the constitutional meaning of equal education. One study has suggested that attention should be focused on the product or result of the educational process. Thus, the standard would be not merely whether the school was an "equal school," that is, whether the state was providing numerically equal facilities, but whether each student in the various schools was equipped at the end of his education to compete with others on an equal basis. Under such an approach, education should prepare a person to respond adequately to the demands placed on him by modern society. For example, where modern industrial technology requires that a person acquire certain language and computational skills in order to effectively function in society, education must provide such skills or it is constitutionally defective. This emphasis on educational results seems to be a very realistic way of evaluating equal educational opportunities. It would effectively implement an idea inspired by Horace Mann, who wrote:

I believe in the existence of a great, immortal, immutable principle of natural law, or natural ethics,—a principle antecedent to all human institutions, and incapable of being abrogated by any ordi-

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127. Developments, supra note 18, at 1188.
128. EDUCATION, supra note 3, at 4. Professor Levin states that if education does not prepare a person for the normal demands placed upon him, it is inadequate. This would include, for example, the normal level of literacy required to prepare tax returns, apply for insurance benefits, pass written examinations for driver's licenses and work permits, etc.